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### Judges and the Criminal Law in England 1808-1861

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Nineteenth century judges, with a few notable exceptions, do not enjoy high reputations as criminal lawyers. They are notorious for their defence of England's 'bloody code', they resisted later attempts to codify the law and displayed a marked reluctance to develop general principles of fault liability through the common law. Reformers castigated the judges as reactionaries, whose instinctive opposition to change seriously inhibited their attempts to create a uniform, rule-based system of justice. Some historians have echoed this view. In Gatrell's recent assessment, the criminal law judges 'confront us with a peculiar and diminished species of being in whom benevolence, sympathy, love, and the imaginative faculties were denied.' He argues that it was 'to the last ditch, and vindictively that these men defended their power to hang people'.<sup>1</sup>

Implicit in Gatrell's account and in many others, is the idea that the judges were clinging to a model of justice that was in terminal decline. According to Wiener: 'During the first half of the nineteenth century, criminal justice was pressed to move from a series of expressive, semipersonal confrontations, personally directed by an involved judge and with highly variable results, to a more restrained, rule-governed, predictable, depersonalised process.'<sup>2</sup> The repeal of the capital laws in the 1830s in particular is usually understood to signify the end of what King describes as the

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<sup>1</sup> V. Gatrell *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford, 1994), pp. 499, 500.

<sup>2</sup> M. Wiener, *Reconstructing the Criminal, Culture, Law and Policy in England 1830-1914* (Cambridge, 1990) p. 65. For a similar conclusion see, J. Beattie, *Crime and the Courts in England, 1660-1800*, (Princeton, 1986), p. 636.

‘golden age of discretion’.<sup>3</sup> Rather than using the terror of the scaffold as a deterrent, the law would instil discipline through impersonal processes, clearly defined offences and strictly proportionate punishments. In the words of one leading reformer, Sir James Mackintosh, the law would become ‘the school of public discipline ... and [be] pure from every taint of passion or partiality.’<sup>4</sup>

The 1820s and 1830s mark a watershed in the history of English criminal justice, as in so much else: the point of transition from a discretionary, severe regime to a centralised and homogenised system that emphasised and underpinned notions of personal responsibility. This paradigm has structured the history of nineteenth century English criminal law.<sup>5</sup> Whilst it accords with the agenda of certain nineteenth-century reformers, recent research has demonstrated that it does not fit lower levels of the administration of justice. Magistrates, for example, routinely ignored the letter of the law in the exercise of their discretion leading to widespread local variations.<sup>6</sup> In this paper I argue that even in the higher criminal courts the paradigm requires revision in light of the judiciary’s attitudes towards the criminal law. The judges did not share the reformers’ agenda. They successfully resisted some of the proposed reforms and, more significantly, retained discretion to shape the criminal law according to their own beliefs at the assizes. Thus whilst the first two parts of the paper attend to the wider context of criminal law reform in the period, the final part looks at felony trials. The focus is on those aspects of the judges’ approach that emphasise important continuities with the discretionary mode of justice that is assumed to have declined in the period, in particular sentencing and the relationship between the trial judge and the jury. I have chosen the year in which Samuel Romilly began his parliamentary campaign to reform the criminal laws as the start date and 1861 seems like an appropriate end date, being the year in which the death penalty was confined to

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<sup>3</sup> P. King, *Crime, Justice and Discretion in England 1740-1820*, (Oxford, 2000), p. 1. See also, A. Norrie *Crime, Reason and History* 2<sup>nd</sup> ed. (London, 2001), pp. 1-4, 15-31.

<sup>4</sup> *Parliamentary Debates*, series 2, vol. 9, cols.418-419, 21 May 1823 (House of Commons).

<sup>5</sup> For a valuable overview of the historiography, see M. Finn ‘The Authority of the Law’ in Mandler (ed), *Liberty and Authority in Victorian Britain* (Oxford 2006), pp. 159-178.

<sup>6</sup> *Ibid.* pp. 160-164. See also P. King *Crime and Law in England 1750-1840* (Cambridge, 2006), pp. 1-69

murder and a number of consolidating Acts signalled the end of the reforming efforts that had been made over the preceding half century.

## I.

Romilly's parliamentary campaign against the widespread use of the punishment of death in the 1810s instigated a series of movements that ultimately led to a transformation of the face of English criminal justice. The 'bloody code' was swept away in the 1830s leaving only a handful of felonies punishable with death. In 1836, the Prisoners' Counsel Act allowed defence counsel the right to address the jury directly for the first time. Over the next quarter century, the first sustained efforts were made to rationalise the substantive law and to establish a court of appeal in criminal law. These attempts enjoyed mixed success but were intended to set the foundations for a new, uniform and consistent criminal justice system.

The judges' attitudes towards these proposed reforms can be gleaned from the parliamentary debates and their evidence before numerous select committees and commissions. Their approach to the question of penal reform in the 1810s and 1820s set the tone for subsequent decades. The Lord Chief Justice, Lord Ellenborough, and the Lord Chancellor, Lord Eldon were the most vociferous opponents of attempts to mitigate the severity of the law. When Romilly proposed to abolish the death penalty for shoplifting, Ellenborough reacted with alarm: 'we shall not know where to stand; we shall not know whether we are upon our heads or our feet.'<sup>7</sup> The debate was hard fought, but for many historians the judges and their parliamentary allies had lost it before it had begun. In the words of McGowen, 'the battle was fought by a rear guard against ideas that had already invaded the citadel.'<sup>8</sup>

The penal reform debate is conventionally portrayed in bipolar terms. On the one side reformers who advocated certain and mild forms of punishment and, on the other, their opponents who advocated harsh, discretionary justice. The collapse of the 'bloody code' in the 1830s is seen as a triumph for the reformers' model of justice in its entirety. As Hilton has recently pointed out in a valuable reappraisal of Peel's role

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<sup>7</sup> 1 PD, vol. 19, (1811), appendix (Debates in the year 1810 on Sir Samuel Romilly's Bills), 118, 30 May, 1810, (Lords).

<sup>8</sup> McGowen "The Image of Justice", p. 123

as a law reformer, this way of presenting the debate seems too one-dimensional, too ‘whiggish’.<sup>9</sup>

The judges were not all high Tories locked into the sort of reactionary mode of thought exemplified by Ellenborough’s comments above. Even Eldon had misgivings about the infliction of the death penalty in particular cases.<sup>10</sup> Ellenborough and Eldon’s successors as Lord Chief Justice and Lord Chancellor, Tenterden and Lyndhurst, took a softer line and co-operated in many of the more limited efforts made towards reform. Subsequent Lord Chief Justices, Denman and Campbell, were moderate Whigs and law reformers. When the exceptional Brougham was Lord Chancellor, a number of key reforms were initiated from the Woolsack. The politics of the higher judiciary were mixed therefore, especially after 1830. Even Lyndhurst, although a Tory, had liberal sympathies in his youth and was thought by many, including Denman, to have chosen his political course on the basis of expediency rather than principle.<sup>11</sup>

It is also important to note that holders of high judicial office seldom tried felonies. Romilly complained of Ellenborough’s lack of knowledge in criminal matters, whilst Eldon openly admitted that he had very limited experience.<sup>12</sup> The puisne judges did the majority of the work but it is difficult to discern any uniform political outlook amongst them. Many had no strong partisan links at all. In his detailed study of judicial appointments in the period 1727-1875, Duman found that just over half of judges appointed in the period were MPs. He argues that political allegiance was sometimes influential in appointments to puisne judgeships but was ‘by no means an essential criterion for appointment’.<sup>13</sup> From the 1830s onwards ability became the key factor, and even before that time the number of judges appointed solely on the basis of connection was few.<sup>14</sup>

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<sup>9</sup> B. Hilton “The Gallows and Mr Peel” in Tim Blanning and David Cannadine (eds) *History and Biography Essays in Honour of Derek Beales* (Cambridge, 1996), pp. 91-92.

<sup>10</sup> R. Melikan *John Scott, Lord Eldon 1751-1838: the Duty of Loyalty* (Cambridge, 1999), p. 258.

<sup>11</sup> See G. Jones “Three Very Remarkable Nineteenth-Century Lawyers: Lyndhurst, Denman and Campbell” in G. Rubin and K. O’Donovan (eds) *Human Rights and Legal History Essays in Honour of Brian Simpson* (Oxford, 2000), pp. 172-204, p. 178.

<sup>12</sup> 1 PD, 19, 1811, 110, 30 May, 1810, (Lords).

<sup>13</sup> D. Duman *The Judicial Bench in England, 1727-1875* (London, 1982), p. 78, 80.

<sup>14</sup> *Ibid.* pp. 81-82.

If judges did not conform to a particular type, nor did the men usually labelled as criminal law reformers. Romilly, Mackintosh, Jeremy Bentham and William Ewart are often grouped together with insufficient heed paid to the differences in their respective philosophical and political outlooks. For example, Mackintosh's whiggish ideas about the need for the criminal laws to develop in accordance with an organically evolving society were almost completely antithetical to the Benthamite approach to law reform.<sup>15</sup> The debates over criminal law reform in the period are best understood with reference to the key substantive issues at stake, rather than the political allegiances of the participants. Hilton suggests that it is helpful to consider at least two polarities, the first concerning the desirable level of severity in the administration of the criminal law, the second concerning the desirable level of discretion.<sup>16</sup>

The eighteenth century criminal justice system was 'shot through with discretion'.<sup>17</sup> At every stage a variety of actors held discretion to shape outcomes and these practices were understood and accepted as part of the normal operation of justice. In the late eighteenth and early nineteenth century however, they became the object of sustained criticism from reformers concerned to institute more certainty and predictability into the criminal process. They explained the prevalence of discretionary practices by reference to the severity of punishment. The existing law was condemned as a 'bloody code' that had irretrievably alienated public opinion and which operated to deter jurors, prosecutors and witnesses from playing their crucial part in enforcing the law.<sup>18</sup> The divide between public sentiment and the law was fatal to the administration of justice. According to Mackintosh: 'We cherished a system, which in theory was odious, but which was impotent in practice, from its excessive severity'.<sup>19</sup>

Parliamentary campaigners against the capital laws in the 1810s and 1820s also focussed substantial criticism towards the power of the judge and in particular his

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<sup>15</sup> See the discussion in Hilton "The Gallows and Mr Peel", pp. 102-107.

<sup>16</sup> Ibid, p. 92.

<sup>17</sup> King *Crime, Justice and Discretion*, p.1.

<sup>18</sup> For a typical and forceful expression of this argument see the speech of Thomas Fowell Buxton in an 1821 Commons debate on forgery which was also published as a pamphlet: 2 PD 5, (1821), 900-952, 23 May, 1821 (Commons); T. Buxton *Severity of Punishment: Speech in the House of Commons on May 23 1821 on the bill for mitigating the severity of punishment in certain cases of forgery* (London, 1821).

<sup>19</sup> 3 PD 9, (1823) 397, 21 May, 1823 (Commons).

discretion to determine whether the sentence of death would be carried out. Romilly thought the power ‘highly dangerous’ and accused the judges of having created a ‘lottery of justice’.<sup>20</sup> Mackintosh agreed: ‘It was by the extent of discretion left to the judge in criminal cases, that we were now distinguished from, and opposed to every other country in the world.’<sup>21</sup> These reformers condemned a species of justice that appeared to depend on the whim of individuals.

For the judges, the charges levelled by the reformers were barely comprehensible. In their opinion the retention of the death penalty was essential if the law was to preserve its effect. According to Ellenborough: ‘After all which has been stated in favour of this speculative humanity, it must be admitted, that the law, as it stands, is but seldom carried into execution, and yet it ceases not to hold out that terror which alone will be sufficient to prevent the frequent commission of the offence.’<sup>22</sup> In the judiciary’s view, far from being arbitrary, the prerogative of mercy and discretion were what made the system humane. The judge ensured that the trial was conducted fairly and that the law was tempered where necessary.<sup>23</sup> As Lord Lyndhurst expressed it: ‘The whole system of our Criminal Code was founded on discretion’.<sup>24</sup>

In the first decade of the campaign against the death penalty, the judges’ ‘practical’ experience was preferred to the ‘speculative theories’ of the reformers in the House of Commons. Indeed, Romilly had serious difficulties in attracting attention to his cause and very little success in achieving legislative change.<sup>25</sup> Thereafter a number of scandals, particularly surrounding the crime of forgery, generated momentum for the reform movement and enabled reformers to substantiate their charge that public opinion was set against the severity of the law.<sup>26</sup> The rapid

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<sup>20</sup> 1 PD 19, (1811) 12, and 1 PD 11, (1808), 397, cited by R. McGowen “The Image of Justice” 32 *Buffalo Law Review*, 1983, p. 100.

<sup>21</sup> 2 PD 7, (1822), 794, 4 June, 1822, Commons.

<sup>22</sup> 1 PD 19, (1811), 89 app., 30 May, 1810, (Lords).

<sup>23</sup> See Ellenborough’s description of the judicial role: 1810: 1 PD 19, (1811), 112-113 app., 30 May, 1810, (Lords).

<sup>24</sup> 3 PD 17, (1833), 1015, 7 May, 1833, House of Lords. Lyndhurst was Lord Chancellor in 1827-1830, 1834-5 and 1841-1846.

<sup>25</sup> See P. Handler “Forging the agenda: the 1819 select committee on the criminal laws revisited” 25, *Journal of Legal History*, (2004) pp. 249-268, p. 254.

<sup>26</sup> The reformers’ success in constructing ‘public opinion’ in this period does not of itself evince evidence of a growing distaste for the death penalty. See: Gatrell *The Hanging Tree*, pp. 396-416; Handler “Forging the agenda”; *idem* “Forgery and the

rise in prosecutions at the beginning of the nineteenth century also played a crucial role in shifting perceptions of justice.<sup>27</sup> The consequent increase in capital convictions meant that, after 1815, over 90% of convicts sentenced to death were pardoned.<sup>28</sup> This made the idea of a severe law tempered by mercy difficult to sustain. It also placed the judges, who were responsible for granting pardons in most cases, in an increasingly invidious position. What was really objectionable and unpalatable to the public was not the judge's discretion *per se*, but his power over life and death. Even Cottu, the French admirer of the English criminal justice system, felt obliged to 'confess that there seems something more in so unlimited a power than ought ever to be entrusted to any one man'.<sup>29</sup>

The reformers' success in establishing their critique of the 'bloody code' in the 1820s facilitated the reforms of the 1830s that effectively confined the death penalty to murder and attempted murder. Yet the legislation that mitigated the law also retained many of the discretionary powers of judges and juries and in some instances actually increased them. For example, the statute of 1837, which rendered most forms of serious assault non-capital, gave juries a new power to return a conviction of common assault wherever a felonious assault was charged.<sup>30</sup> Juries continued to have discretion to return partial verdicts in other cases such as murder.

Judges were given a wide sentencing discretion under the new statutory framework. In cases of burglary for example, the court was empowered to sentence offenders to 'be transported beyond the seas for the term of the natural life ... or for any term not less than ten years, or to be imprisoned for any term not exceeding three years.'<sup>31</sup> A similarly wide sentencing discretion was bestowed in cases of forgery, serious assaults, robbery and stealing from the person. Some of the statutes specified a minimum or maximum period either of imprisonment or transportation, but generally

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end of the 'Bloody Code' in early nineteenth century England", 48, *The Historical Journal*, 2005, pp. 683-702.

<sup>27</sup> For the pattern of prosecutions see C. Emsley, *Crime and Society in England*, 3<sup>rd</sup> ed, (Harlow, 2005), 32-33.

<sup>28</sup> Gatrell *The Hanging Tree* p. 21.

<sup>29</sup> M. Cottu *On the Administration of the Criminal Code in England* (London, 1820), pp. 38-39.

<sup>30</sup> 1 Vict. c. 85, s. 11.

<sup>31</sup> 1 Vic. c. 86, s.3.

the discretion given to judges was very wide and there was no guidance as to how it should be exercised.<sup>32</sup>

The judges supported these measures, whilst many reformers actually took exception to the bills.<sup>33</sup> William Ewart, the most prominent proponent of criminal law reform of the 1830s, when speaking on the Offences against the Person Bill in 1837, stated that he:

‘objected to the discretion proposed to vest in the judge, though he knew that certain limits in these matters must be allowed to him. But that discretion should be as little as possible; and those limits should be so well defined and fixed, that he should not be readily able to pass them.’<sup>34</sup>

Lord Brougham also lamented the fact that the Bills had been introduced before the Royal Commission on the Criminal Laws had completed its investigation and concurred in the Commissioners’ view that ‘any partial alteration would inevitably produce great inconvenience, and that the only effectual remedy consisted in an entire revision and re-construction of the whole fabric of the criminal law’.<sup>35</sup> Brougham’s and Ewart’s objections went unheeded. Thus whilst it is clear that the 1830s legislation substantially mitigated the severity of the law, the question of the desirable level of discretion in the criminal law remained the subject of controversy and debate.

## II.

The reduction in the use of the death penalty was only one aspect of a reforming agenda that attempted to overhaul the criminal justice system in this period. Efforts

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<sup>32</sup> 1 Vic. c. 84, s. 1 (forgery); 1 Vic. c. 85, ss.3, 4 (offences against the person); 1 Vic. c. 87, ss. 3, 5 (robbery, stealing from the person). See L. Radzinowicz and R. Hood “Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem”, 127 U. Pa. L. Rev., (1978-1979) 1288-1349. It is noteworthy that an 1832 Act for the abolition of the death penalty for certain theft offences required that the punishment of transportation for life should invariably be inflicted in its place. The requirement proved unworkable and was quickly repealed. See L. Radzinowicz *A History of English Criminal Law from 1750*, 4 vols, (London, 1948), vol I, pp. 603-604.

<sup>33</sup> 3 PD, 38 (1837), 1774, 4 July, 1837 (Lords).

<sup>34</sup> 3 PD, 38 (1837), 257, 24 April, 1837 (Commons).

<sup>35</sup> 3 PD, 38 (1837), 1786, 4 July, 1837 (Lords).



were made to rationalise the law, to introduce a system of criminal appeals and to give prisoners full rights to defence by counsel. I do not wish to rehearse the history of these matters in full, but instead to highlight some of the key features of the judges' approach to the questions. For the most part, the judges opposed these measures. They did so for a number of reasons, but at the heart of their position was the desire to retain discretion and ensure that questions of criminal law remained simple and capable of being determined quickly by a jury.

Judges feared that the effect of granting the prisoner's counsel the right to address a speech to the jury would be obfuscatory and result in the needless elongation of the trial. The possibility of an appeal raised the prospect of long drawn out criminal proceedings with punishment following weeks or months after sentence. This did not accord with the judges' vision of how criminal justice should be administered. They kept a more or less dignified silence in public on the question of prisoners' counsel, but Lord Campbell estimated that twelve out of the fifteen judges opposed the measure, with Park J apparently threatening to resign if it passed.<sup>36</sup> In their evidence before the House of Lords select committee on criminal appeals in 1847 however, they made their feelings plain, all of them emphasising the importance of there being, in Baron Parke's words, 'a speedy Determination of every Charge of Crime'.<sup>37</sup> In part, the judicial preoccupation with speed was determined by practical considerations, specifically the need to get through the assize business in good time.<sup>38</sup> But there were other concerns as well according to Lord Lyndhurst: 'The criminal law depends for the effect ... which it has in deterring ... by Example of punishment, upon the speediness with which the Execution of the Sentence follows Trial.'<sup>39</sup>

The presence of defence counsel or long processes of appeal would inhibit this model of quick, exemplary justice. In any event, the judges did not think that there was any need for an appeal in criminal matters or for long speeches by counsel, because difficult or complex questions seldom arose. Judges rejected the reformers'

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<sup>36</sup> M. Hardcastle (ed) *Life of John, Lord Campbell*, 2 vols, (London, 1881) II., pp. 106-107 cited by A. May *The Bar and the Old Bailey 1750-1850* (London, 2003), p. 183.

<sup>37</sup> *Select Committee of the House of Lords on Administration of Criminal Law Amendment Bill*, Parliamentary Papers, 1847-1848, 523, (hereafter 1848 SC), Minutes of Evidence, p. 4.

<sup>38</sup> In the event, fears that the defence counsel's speech would immediately have the effect of elongating proceedings proved unfounded. See May *Old Bailey*, pp. 197ff.

<sup>39</sup> 1848 SC, Minutes of Evidence, p. 49.

argument that the criminal law should be brought into line with the civil system of appeals. According to Baron Parke: '[I]n Criminal Cases the Questions submitted to the Jury are, with very rare Exceptions, extremely simple, and the Juries act without any Prejudice.'<sup>40</sup> If points of law arose the practice of the trial judge reserving points for the consideration of the common law judges allegedly ensured that no injustice could arise. Some judges recognised the shortcomings of this system of reserving points. Lord Denman thought the mechanism 'highly objectionable' and observed that there was 'some want of decorum' in the proceedings before the judges. Lords Lyndhurst and Brougham agreed, but none of the judges favoured a right of appeal or allowing motions for a new trial. In Denman's opinion, the 'great object ought to be to make the first trial in all respects perfect and final'.<sup>41</sup> He suggested that juries might become lax in the discharge of their duties, if they knew that their decision would be subject to correction on appeal.<sup>42</sup> Judges were satisfied that the royal pardon was a sufficient safeguard for those rare occasions when someone was improperly convicted.

The high level of complacency in the judicial responses is noteworthy, if unsurprising. Most claimed to have experienced no incidents of improper convictions and expressed the opinion that they were extremely unlikely to occur. Their vision of the trial had the judge at its heart. He could be relied upon to reserve points of law or to secure a royal pardon if there was an improper conviction and there was no need for any supervision or other means of redress. A few of the judges conceded that the private system of appealing for mercy was imperfect, but none was willing to countenance any of the alternative mechanisms. As a result, despite various attempts throughout the nineteenth century, the only change made was the creation of the Court for Crown Cases Reserved, which merely had the effect of placing the existing mechanism of reserving points of law for consideration by the body of common law judges on an official footing.<sup>43</sup> The fact that the bill had been prepared by Baron

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<sup>40</sup> Ibid, p. 9. Parke had not changed his opinion almost 20 years later when he stated to the Royal Commission on Capital Punishment that: 'There are very seldom any questions of real doubt in administering the criminal law; all the questions of doubt are those connected with property and contracts.' (*Report of the Capital Punishment Commission*, Parliamentary Papers, 1866, 35390, Minutes of Evidence, p. 56).

<sup>41</sup> 1848 SC, Minutes of Evidence, pp. 45-46 (Denman), 47-48 (Lyndhurst), 49-50 (Brougham).

<sup>42</sup> Ibid, p. 45.

<sup>43</sup> 11 & 12 Vict., c. 78.

Parke and Baron Alderson may explain its success.<sup>44</sup> It ensured that the judges gave reasons for the decisions that they made on the criminal law, but had little other effect. The Court heard a steady trickle of cases each year, but the small volume of cases, together with the judges' reluctance to set out general principles of criminal law, severely limited its influence.<sup>45</sup> There was no effective court of criminal appeal until 1907.

The judges' concern to avoid complications in the criminal law and their distrust of generalising principles were evident in their approach to legislative schemes to consolidate and codify the criminal law. They consistently disparaged attempts to effect sweeping changes, relying upon familiar arguments about the benefits of flexible common law principles. In one respect this simply reflects the common law mind's distrust of projects of codification, but it was also consistent with judges' attitude towards the criminal law in particular. Peel's very limited reforms of the 1820s met with their approval and co-operation. His bills to consolidate and simplify the law, whilst maintaining capital punishment for most of the felonies that were punished with death in practice, were carried through with the assistance of Chief Justice Tenterden. Tenterden read and amended drafts of Bills, before they were put forward to parliament and corresponded closely with Peel. In relation to the forgery bill of 1830 for example, Tenterden made a number of changes to the wording and scope of the bills and Peel was careful to express his gratitude.<sup>46</sup> Tenterden's supervision of the bills in the House of Lords ensured that Peel enjoyed more success than Romilly and Mackintosh had done.

The involvement of judges and lawyers in the drafting of bills often ensured that existing terminology was retained. So for example, in the preparation of the forgery bill of 1830, the Attorney General took exception to the departure from the phraseology of previous Acts and a compromise was reached.<sup>47</sup> This pattern repeated itself in the drafting of criminal laws over subsequent decades, sometimes to the

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<sup>44</sup> See Parke and Alderson's evidence before the 1848 Select Committee: 1848 SC, Minutes of Evidence, pp. 3-13.

<sup>45</sup> See R. Pattenden, *English Criminal Appeals 1844-1994*, (Oxford, 1996), 8-10; D. D. Bentley, *Select Cases from the Twelve Judges Notebooks* (London, 1997), Appendix 4, table b, p. 196.

<sup>46</sup> For the correspondence on the bill in the early months of 1830, see Peel Papers BL Add MSS 40399, fos 410 419; 40400, fos. 3, 30, 37, 76-80, 89.

<sup>47</sup> Peel to Gregson, January 7, 1830, Peel Papers BL Add MSS 40400, fo. 14; Tenterden to Peel, February 28, 1830, Peel Papers BL Add MSS 40400, fo. 78.

consternation of those who wished to simplify and clarify the language of the law. The attempts to codify and consolidate the law following the reports of the Royal Commission on the Criminal Laws provide the clearest examples. In 1853, the Lord Chancellor sought the judges' opinion on the expediency of preparing a statute for the criminal law as a whole and on two bills that had been prepared to amend the law of offences against the person and on larceny. However the judges were uniformly opposed to the creation of any kind of a code and at pains to point out the inadequacies of the bills. They presented familiar arguments about the benefits of flexible common law principles and warned of the dangers of the 'court and jury being bound by precise words and expressions' typical of statutes.<sup>48</sup> In the words of Chief Baron Pollock, a new code would 'create very, very much more doubt than now exists'.<sup>49</sup> In contrast, the rules of the common law, according to Baron Parke, were 'clear and well understood'.<sup>50</sup>

Unsurprisingly the judges' attitudes drew criticism from those concerned to ameliorate the criminal law through legislation. The men who had prepared the bills, Charles Greaves and James Lonsdale, published a pamphlet that sought to rebut the judges' objections.<sup>51</sup> The judges' insistence that the common law provided clarity and certainty was particularly objectionable in view of the Royal Commission's extensive criticisms. The *Law Review* magazine thought the judges' claim 'singular' in view of the state of the common law.<sup>52</sup>

The tone of the judicial responses indicates that they were predisposed to distrust legislation in criminal law. For example at one point, having listed a number of problems with a proposed bill relating to rape, Baron Alderson bluntly declared that: 'All this difficulty comes from defining in words the crime of rape and carnal knowledge'.<sup>53</sup> Underlying this judicial attitude was the belief that questions of criminal law were best decided at the trial where there was sufficient flexibility to

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<sup>48</sup> *Copies of the Lord Chancellor's Letter to the Judges and of their Answers respecting the Criminal Law Bills of the Last Session* Parliamentary Papers, 1854, (303), p. 19 (Justice Wightman).

<sup>49</sup> *Ibid*, p. 6.

<sup>50</sup> *Ibid*, p. 7.

<sup>51</sup> C. Greaves and J. Lonsdale, *A Letter to the Lord Chancellor containing observations on the answers of the judges to the Lord Chancellor's letters on the criminal law bills of the last session of parliament* (London 1854).

<sup>52</sup> Anon. 'The Judges and the Criminal Code', 20 *Law Review*, (1854), 110, 117.

<sup>53</sup> *Copies of the Lord Chancellor's Letter*, p. 10.

ensure that a broad view could be taken of each case. They drew a sharp distinction between criminal and civil matters. In the latter, difficult points arose and appeals were necessary and desirable, but so far as the criminal law was concerned, judges wanted to avoid even the possibility of any difficult questions of interpretation or construction arising. Baron Parke suggested that the frequent questions for judicial decision that would arise from any code would 'be a great evil, especially in the administration of the criminal law, from which it is now comparatively free, as the points which arise in it are in a striking degree less frequent than in the administration of civil justice.'<sup>54</sup> As is well known, the attempts to codify the law floundered in the 1850s and the intransigent attitudes of the judiciary contributed hugely to this failure. The consolidating statutes of 1861 for the most part retained the language and offences of former acts.<sup>55</sup>

### III.

The judges' attitudes towards the key parts of the agenda of criminal law reformers of the first two thirds of the nineteenth century could, at times, be accurately characterised as being conservative, complacent and stubbornly reactionary. They were also motivated by practical considerations and by self-interest. Yet their approach amounted to more than just that. The judges believed in the need to retain the centrality of the jury trial for felonies in the justice system. They resisted attempts that were made to complicate the trial or to undermine the finality of the verdict. Nor were their attitudes static or wholly negative. They came to recognise, reluctantly at first, that the effective operation of justice required public support. The days when judges could openly defy opinion, as when Ellenborough rode, laughing through the jeering crowd following William Hone's acquittal for blasphemous libel in 1817 before stopping to buy kippers, were drawing to a close.<sup>56</sup> In an 1832 debate on mitigating the punishment of death for forgery, the future Lord Chancellor, Sir Edward Sugden, stated that 'when one general and universal opinion pervaded the

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<sup>54</sup> Ibid. p. 8.

<sup>55</sup> For the history of the legislation, see C. Greaves *The Criminal Law Consolidation Acts of the 24 & 25 Vict with notes, observations and forms for summary proceedings*, 2<sup>nd</sup> ed., (London, 1862).

<sup>56</sup> W. Townsend *The Lives of twelve eminent judges of the last and present century* 2 vols., (London, 1846), I. p. 388, cited in Gatrell *The Hanging Tree* p. 531.

public mind amongst all ranks and classes, let it be right or wrong, the Members of that House were bound to attend to it.’ Even the deeply reactionary judge, Lord Wynford, accepted the need for change.<sup>57</sup> If the judges recognised the need for the criminal justice system to respond to public opinion and to the growing fears about the threat of crime in the first half of the nineteenth century, they differed from reformers on the question of how that response ought to be made. The remainder of this paper focuses on judicial attitudes towards two particular and important areas of trial practice: the judge’s relationship with the jury and sentencing.

Judges and juries worked together harmoniously in felony trials in the eighteenth century. This was important in the context of an assize system that had limited time to deal with cases. Jurors were often experienced which further facilitated the process and obviated the need for detailed judicial instructions.<sup>58</sup> Judges did not seek to exert undue pressure on juries who retained substantial independence and used their discretion to acquit or convict on a lesser charge with regularity. This ‘pious perjury’, as Blackstone termed it, was tacitly condoned by judges.<sup>59</sup>

In contrast to the eighteenth century, the evolution of judge jury relations in the nineteenth century has not been much studied. As Wiener has recently pointed out, we know relatively little about the judges and jurors of the period or about the sorts of factors that informed their decisions.<sup>60</sup> It has been presumed rather than demonstrated that the discretionary practices common in the eighteenth century declined in the nineteenth and that something approaching a recognisable modern trial emerged. Two principal reasons underlie this presumption. The first is that changes within the trial, in particular the increased presence of lawyers, meant that proceedings were increasingly professional and formal. The second is that legislative

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<sup>57</sup> 3 PD 14 (1832), 984, 31 July, 1832 (Commons); 3 PD 14 (1832), 1348, 13 August, 1832 (Lords). Sugden and Wynford still argued for the retention of the death penalty for certain types of forgery.

<sup>58</sup> See J. Beattie, *Crime and the Courts*, 406-410. T. Green, *Verdict According to Conscience perspectives on the English Criminal Trial Jury 1200-1800*, (Chicago, 1985), pp. 267-317.

<sup>59</sup> W. Blackstone *Commentaries on the Laws of England* facsimile of the first edition of 1765-1769, (Chicago, 1979), p. 239.

<sup>60</sup> M. Wiener, “Judges v Jurors: Courtroom Tensions in Murder Trials”, *Law and History Review*, 17.3 (1999): 64 pars. 23 Aug. 2007  
<<http://www.historycooperative.org/journals/lhr/17.3/wiener.html>>, par. 6.

reform in the 1830s and the removal of the death penalty in particular removed the scope and incentive for courtroom participants to nullify or modify the law.

The rise of lawyers and of adversarial procedure has been the subject of much scholarly attention over recent years.<sup>61</sup> The admission of defence counsel into felony trials in the 1730s wrought a change in the structure of the trial that was eventually to lead to full adversary procedure. The effect of the arrival of lawyers on the judicial role was very significant in the long term. It meant that they retreated from the fray and ceded their fact-adducing role to the lawyers.<sup>62</sup> The coming of lawyers also brought with it an increasingly detailed body of rules of evidence and subjected the judge to more scrutiny. Yet, as Cairns warns, it is important to be wary of overemphasising the effect of these changes at least insofar as the first half of the nineteenth century is concerned.<sup>63</sup> Indeed, throughout the nineteenth century, most trials continued to be lawyer free.<sup>64</sup> Where lawyers were present, the effect was not necessarily to instigate more regularity into proceedings. Defence lawyers were bound to exploit jurors' sympathies and encourage them to persist in the use of mitigating practices. Thus whilst the structure of the trial may have shifted to an adversarial model, there continued to be space in trials for judges and jurors to persist in the sorts of activities that characterised their role in the eighteenth-century trial.

The reduction in capital offences in the 1830s removed one of the key incentives for the juries' discretionary practices but, as we have seen, the legislation left the juries discretion intact in a number of cases. The reformers' argument, that the only reason behind juries' nullification and modification of the law was the death penalty, cannot be taken at face value. Defenders of the death penalty contested the claim. In 1830, Lord Lyndhurst commented: 'There might be times of great excitement, when a run, if he might so express it, was made upon the humanity of juries, and they became reluctant to find men guilty; but in ordinary times and cases

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<sup>61</sup> See J. Beattie "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries", *Law and History Review* 9 (1991) pp. 239-263; D. Cairns *Advocacy and the Making of the Adversarial Criminal Trial* (Oxford 1998); J. Langbein *The Origins of Adversary Criminal Trial* (Oxford, 2003); A. May *The Bar and the Old Bailey 1750-1850* (London, 2003).

<sup>62</sup> See Langbein *The Origins of Adversary Criminal Trial* pp. 311-314.

<sup>63</sup> Cairns *Advocacy*, p. 54

<sup>64</sup> D. Bentley *English Criminal Justice in the Nineteenth Century* (London, 1998), p. 108.

he had seen no such reluctance.’<sup>65</sup> ‘Runs’, of the sort Lyndhurst referred to, could have substantial effects. In 1818, resentment of the Bank of England and its policy prompted a number of high profile acquittals for bank note forgery. Despite the fact that the juries were not motivated by a principled opposition to the death penalty, reformers seized on the events as evidence of widespread opposition to the hanging laws and secured a crucial select committee to investigate the issue in 1819. Its report was highly influential in substantiating the argument that the tide of public opinion had turned against the capital laws.<sup>66</sup> The forgery acquittals in 1818 were exceptional. In ordinary trials, there is little evidence beyond that offered by reformers to suggest that an increased distaste for the death penalty was inhibiting the operation of justice to the point of collapse. Indeed the large rise in felony prosecutions at the beginning of the nineteenth century suggests that the middling sort of people upon whom the system relied continued to co-operate willingly with it.<sup>67</sup>

The discretionary practices employed by juries were not inextricably bound up with the punishment of death and the scope for their use survived the 1830s legislation. If the reformers’ vision of a new, more certain and predictable system of justice was to be realised in the courtroom, it was the judge’s responsibility to ensure that the law was applied by tightening controls over the jury’s discretion. In certain areas, judges sought to curb the more merciful instincts of juries in order to put the law into force. In his detailed study of Victorian homicide, Wiener argues that, as concerns over drunken, impassioned and violent behaviour, particularly towards women, increased, judges sought to narrow the grounds of exculpation for murder. The defences of provocation and intoxication were restricted and defined by reference to objective standards. Wiener relates these courtroom developments to the broader civilising offensive of the Victorian period. He suggests that judges shared ‘a new sense of ‘mission’ to moralise the populace and to make the law a crucial school for the development of self-mastery.’<sup>68</sup> There is ample evidence that the judiciary shared the Victorian moralising agenda. Yet the idea that they wished to pursue this agenda by means of the articulation of clear, generalised and increasingly precise legal

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<sup>65</sup> 3 PD, 25, (1830), 844, House of Lords.

<sup>66</sup> See P. Handler “Forging the agenda” pp. 249-268.

<sup>67</sup> See above n. 27.

<sup>68</sup> M. Wiener, “Judges v Jurors” paras 14-23; idem, *Men of Blood; Violence, Manliness, and Criminal Justice in Victorian England* (Cambridge, 2004).



standards does not accord with the attitudes towards the criminal law that the judges expressed in political debates about law reform. Judges were reluctant to use legislation or appeal court decisions to articulate general principles of law and were determined to preserve their discretion to deal with cases on an individual basis. This structure was unlikely to produce consistency in trials across the country.

In their evidence before numerous select committees and commissions in the mid-nineteenth century period, judges seldom expressed dissatisfaction with juries, suggesting that the good working relationship that they had enjoyed in the eighteenth century continued. For example, Baron Martin extolled the virtues of the jury: 'My notion is that juries almost always find a correct verdict, that they are as good a tribunal as can exist, and that they find an honest verdict upon all occasions.' He had only known one case in which a woman was charged with the murder of her child and the jury returned an unexpected conviction.

[I]t was so unlike murder that I thought it was not necessary to occupy much time about it. It was a case of manslaughter, and I thought that the jury would at once have found her guilty of manslaughter and accordingly I summed up in very few words. I was very much surprised at the jury desiring to retire; they retired for a couple of hours and they returned with a verdict of guilty of murder, at which I was greatly astonished.<sup>69</sup>

This fact that Martin did not see the need for much of a summing up is revealing of the general level of trust that he had in the jury. Some judges did not direct juries at all. The City judges at the Old Bailey routinely omitted a summing up in the 1830s and 1840s, a practice that continued, albeit less frequently, for the remainder of the century.<sup>70</sup>

Writing in 1863, Fitzjames Stephen shared his brethren's trust of the jury. He argued that the jury's verdict supplied 'as high a standard of certainty as can be expected for any practical purpose, and it must never be forgotten that the administration of the criminal law is a practical matter, and not a process of philosophical inquiry. It is absolutely essential to the objects in view, that the process should be short and decisive.' Stephen took a pragmatic view of the administration of

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<sup>69</sup> *Capital Punishment Commission Report*, Minutes of evidence, p. 43.

<sup>70</sup> Bentley *English Criminal Justice*, pp. 274-275.

justice as a ‘rough expedient’ and one of the key advantages of this brand of justice was that it commanded public support. He was quite willing to accept that even ‘after all possible public exhortations have been delivered to juries on the duty of putting the law in force ... the jury still retain a certain regard to the consequences, and modify their verdict accordingly.’ This was beneficial because to the public ‘who take a rough view of the matter, and care more for particular results than for general rules, this tends to make the administration of justice popular.’<sup>71</sup>

Other commentators expressed dissatisfaction at the juries’ continued willingness to mitigate the law through partial verdicts and acquittals. In his 1845 pamphlet, ‘The Juryman’s Guide’, George Stephen declared that ‘all humane minds rejoiced at the general abolition of capital punishments’, but they also ‘felt and reasonably expected that when this apology for weakness was removed, jurymen would discharge their duty with firmness and make up in certainty, the influence which our law might be thought to lose by being shorn of its greatest terrors; that reasonable expectation has been miserably disappointed.’<sup>72</sup>

The persistence of the jury’s discretionary practices after the collapse of the ‘bloody code’ can be seen in the law relating to felonious assaults. In a detailed study of felony trials for assault in the period 1803-1861, I found that juries routinely reduced charges of assault with intent to cause grievous bodily harm to the lesser offences of common assault or unlawful wounding after they had been given the power to do so in 1837.<sup>73</sup> Commenting on this practice in 1866, Bramwell doubted whether in ‘one case out of 10 the jury find the greater crime where they can find the less.’<sup>74</sup> Baron Wensleydale (formerly Parke) referred to the ‘natural inclination’ of juries to find prisoners guilty of a lesser offence where possible.<sup>75</sup> Yet judges did not make a sustained attempt to narrow the jury’s discretion and secure more convictions for the crime of assault with intent to commit grievous bodily harm. As often as not they were content to leave the jury to interpret key fault terms such as malice and intention with a minimum level of guidance. The judges had a wide sentencing

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<sup>71</sup> J. Stephen *A General View of the Criminal Law of England*, (London, 1863), p. 208.

<sup>72</sup> G. Stephen *The Juryman’s Guide* (London, 1845), p.138.

<sup>73</sup> See P. Handler ‘The law of felonious assault in England, 1803-1861’, 28 *Journal of Legal History*, 2007, pp. 183-206.

<sup>74</sup> *Capital Punishment Commission Report*, Minutes of Evidence, p. 30.

<sup>75</sup> *Ibid*, p. 54.

discretion, which gave them scope to express their own view of the seriousness of any particular assault in the punishment. Even the minor assault carried a maximum penalty of three years in prison with hard labour. The boundaries between the different grades of assault that were consolidated in 1861 therefore remained very fluid. The law in this particular area did not accord with the reformers' vision of having clearly defined offences and graded punishments.

The practice in relation to felonious assault accords with the general tenor of the evidence given by the judges before parliamentary committees about their relationship with juries. The judges' general level of satisfaction with the relationship suggests that acquittals entirely against the evidence were uncommon. Of course judges were frequently frustrated by jury recalcitrance. They pushed for convictions in certain instances and expressed clear opinions on the facts in their summings up when they thought it necessary.<sup>76</sup> But in their testimony before select committees and in their conduct of assault trials, there is little to suggest that they became concerned to establish general standards of acceptable conduct through the enunciation and uniform enforcement of rules.

Consistency took second place to pragmatism in judicial minds. This is clearly manifest in their approach to sentencing. The wide discretion granted to judges, together with the almost complete lack of supervision, meant that even if all the judges had been committed to securing uniformity, the goal would have been difficult to achieve. But judges were not committed. They measured their sentences according to the perceived need to suppress a particular offence in a given area. For example, one judge on assize in Liverpool referred to the 'brutal mode of conducting their quarrels for which this county is so remarkable' as a reason to impose the relatively severe punishment of 10 years transportation for an assault with intention to do grievous bodily harm.<sup>77</sup> Another, passing a sentence of two years' imprisonment for the same offence in 1851, said that 'if he had reason to believe that the practice was frequent in that neighbourhood he should certainly have sentenced the prisoner to transportation.'<sup>78</sup> Many other examples could be given.<sup>79</sup> The judges' speeches may have lacked the drama associated with the passing of the death sentence, but they

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<sup>76</sup> See Bentley *Nineteenth Century*, p. 275.

<sup>77</sup> *The Times*, 16 Aug, 1847, 7 col.a, Samuel Irish.

<sup>78</sup> *The Times*, 13 March 1851, 7 col.e, John Taylor.

<sup>79</sup> See: Handler "The Law of Felonious Assault", pp. 203-205; Radzinowicz & Hood 'Judicial Discretion', pp. 1307-1313.

were directed more towards the wider community than the individual offender. Judges continued to make reference to the need to make a severe example if local conditions appeared to require it.<sup>80</sup>

The judiciary retained its faith in exemplary and discretionary justice, putting the ideas that they expressed in public debates on criminal law reform into practice in felony trials. This persistent belief has implications for our understanding of the operation of justice during a period, which is conventionally associated with upheaval and change. The reformers' demands for certainty and uniformity in the criminal law depended in large part on trial judges but, in the absence of an overarching legislative framework or an active review court, there was little to constrain them from acting on their own beliefs. This is not to say that judges were able to preserve the existing system in isolation from or opposition to wider cultural forces. On the contrary, the judges shared the increased general fears about crime in the period and they sought to use the criminal law to suppress it. But whereas reformers sought to make the law an instrument of discipline that would hold people unwaveringly responsible for their own actions, the judges preferred to use the law as a selective, discretionary tool that could be utilised according to local and pragmatic considerations. This individualistic approach allowed for a continued tolerance of discretionary practices, which in turn meant that community standards retained a key role in shaping the law. The judges' view of the criminal law as a 'rough expedient' helped ensure that, whilst the administration of criminal law in felony trials changed significantly in this period, it did not do so out of all recognition. In his 1883 history of the criminal law, Stephen reflected: 'I do not think that the actual administration of justice, or the course of trials has altered much since the beginning of the reign of George III.'<sup>81</sup> This statement undoubtedly underestimates the impact of lawyers amongst other things, but it serves as a useful reminder that, from the bench at least, continuity was at least as important a feature of this period as change.

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<sup>80</sup> See for example the letter of Bayly J. on the case of Patrick Brennan in 1848 (NA, HO 18, 214/6).

<sup>81</sup> J. Stephen *A History of the Criminal Law of England* 3 vols. (London, 1883), I, p. 425.